[APPELLATE CIVIL JURISDICTION]

CH'NG JOO TUAN NEOH (f) and KHOO EE LAY (substituted by Order of Court dated 29-2-32)

Plaintiffs
(Second Plaintiff—Appellant).

vs.

KHOO TEK KEONG & OTHERS

Defendants
(First Defendant—Respondent).

[PENANG SUIT No. 224 of 1931]
[PENANG CIVIL APPEAL No. 7 of 1932]

Trustees—breach of trust—wilful default—relief under Section 60, Trustees Ordinance, 1929.

A trustee, who lent trust moneys on the security of jewellery on a valuation made by himself and further advanced estate funds to Chetties on personal security alone, must be held to be guilty of breaches of trust, unless such investments were expressly authorised by the Will of the Testator.

Where a trial Judge had exercised his judicial discretion in granting relief under the Trustees Ordinance it was competent for the Court of Appeal to form its own opinion on the facts as proved as to whether the trustees acted reasonably and ought fairly to be excused.

There could be no excuse if money had been lost through the trustee's own valuation of the jewellery proving incorrect, nor could there be any excuse for advancing estate money to a chetty and on the same day taking an advance to himself.

When a trustee has taken an advance to himself no question of wilful default will arise, inasmuch as it is simply a case of debtor and creditor. This principle applies to trustees drawings on account of his contingent share. The Court will not make an order for accounts on the footing of wilful default on a single act of wilful default.

Appeal by the second plaintiff from the Judgment of Whitley, J., in an action brought by the plaintiffs against the defendants as trustees of the Will of Khoo Eu Yong deceased and tried on the 8th December, 1931, 4th and 5th January, 1932, and 29th March, 1932. The first plaintiff, the widow of the deceased and Khoo Teck Chye a son of the deceased by another wife claimed in the action as legatees under the Will of the deceased for administration of the estate of the said deceased with necessary accounts and inquires and directions on the footing of wilful default, removal of the defendants as trustees, appointment of Receiver and consequential relief. The defendants were sued as trustees of the said Will. The said Khoo Teck Chye died after the first day's hearing and his eldest son Khoo Ee Lay was appointed to represent his estate. Besides other allegations not material to this report, the plaintiffs complained of certain breaches of trust specified in paragraph 9 of the Statement of Claim as follows:—

(1) The 1st Defendant according to his own balance sheet dated 30-4-29 is indebted to the estate in the sum of $18,637.08 without giving security and without paying interest thereof. The 2nd and 3rd defendants have neglected to collect the said sum of $18,637.08 from the said 1st defendant.

(2) The defendants have neglected to collect when due rents for house property forming part of the estate of the testator and in many cases tenants have left without paying rents for many months thereby causing loss to the estate.

(3) The 1st defendant has occupied premises Nos. 226 and 226A situate in Burmah Road, Penang, at a rental of $20 which is too low. Rent for 22 months was debited to the 1st defendant's account in May, 1931.

(4) The 1st defendant have committed breaches of trust or wilful default in lending out trust funds on personal loans on security of jewelleries without valuation. The 2nd and 3rd Defendants have committed breaches of trust in not calling in the said loan after their appointment.

(5) The defendants have neglected to collect when due interest on the said loans which in most cases are in arrears for more than 20 months.

(6) The 1st defendant has committed breaches of trust or wilful default in lending out trust funds to Chetties without securities. The 2nd and 3rd defendants have neglected to call in the said loans after their appointment.

(7) The defendants have neglected to collect when due interest on the said loans which in all cases are over 6 months in arrears.

(8) The defendants have failed to collect tributes due on mining land belonging to the estate when due or alternatively collected the said tributes when due but failed to account for them in the estate accounts at the time of collection. The accounts of the defendant show a sum of $8,329.25 received on the 31st December, 1930, which represents tributes from 20-9-28 to 30-11-30.

(9) By reasons of their negligence and wilful default in the administration of the estate of the Testator the defendants have allowed the beneficiaries to suffer unnecessary and considerable loss.

The defence denied the allegations contained in paragraph 9 of the Statement of Claim and alternatively pleaded that the matters raised by the particulars prior to the 28th July, 1927, had been disposed of in Suit No: 138 of 1927, an action between Khoo Tek Chye, plaintiff, and Khoo Tek Keong, Lim Cheng Chuan and Lim Say Han, defendants.

The relevant facts and arguments are sufficiently related in the Judgments of the Court of Appeal.

Huck Lim for the Plaintiffs.

Ross for the 1st Defendant.

de Buriatte for the 2nd and 3rd Defendants.

Whitley, J., held that the 1st defendant had committed breaches of trust in respect of moneys drawn by him from the estate and rents of Nos. 288 and 288A Burmah Road, which he had not paid and ordered that simple interest of 4% be charged on these items. No breaches of trust were found against the 2nd and 3rd defendants. Accounts were directed to be taken but not on the footing of wilful default. With regard to the personal loans out of trust moneys on security without valuation and loans to Chetties without security the learned trial Judge held, in the alternative, that even if these investments were breaches of trust the first defendant was exempted from liability under Section 60 of the Trustees Ordinance 1929.

The second plaintiff appealed and the appeal was heard by Murison, C.J., Prichard & Terrell, JJ.

Huck Lim, for the Appellant.

Ross, for the Respondent.

Cur. Ad. Vult.

MURISON, C.J.—This is an appeal against the judgment of Whitley, J.

In the original action there were two Plaintiffs and three Defendants. This appeal is by the 2nd Plaintiff only Khoo Ee Lay against the 1st Respondent only Khoo Tek Keong.

The 1st Plaintiff is the widow of one Khoo Eu Yong deceased. The 2nd Plaintiff, the appellant, is a son of the deceased. They sued as legatees under the Will.

The Defendants are and were sued as the trustees of the Will. The 1st Defendant was the active and managing trustee from deceased's death until 19th May, 1929.

The testator died at Penang on the 2nd January, 1919.

Probate was granted to the two executors and trustees named in the Will, *i.e.*, Khoo Heng Poon and Khoo Tek Keong the 1st Defendant-Respondent on the 16th April, 1919.

Khoo Heng Poon died on the 11th February, 1927, and the 2nd and 3rd Defendants were appointed trustees of the Will in his place by Order of Court of the 19th May, 1929.

By an Order of Court of the 2nd March, 1931, the 2nd and 3rd Defendants were appointed joint managing trustees of the deceased's estate.

The testator's Will is dated 16th October, 1918.

After certain bequests he left the residue of his estate to trustees upon certain trusts. Such of these trusts as are material to the present appeal are as follows:—

(1) To accumulate and invest eventual income for 12 years from his death; and then

(2) To divide the whole amount between his wife and sons (Khoo Tek Chye, Khoo Tek Keong, and Khoo Lip Sim) equally.

There was a gift over to the sons or if dead to their children if the wife died before the twelve years expired; and a similar gift over to surviving sons if any son died within the 12 years without children who outlived the 12 years.

Clause 11 of the Will is as follows:—

> "I empower my trustees to invest all monies liable to be invested in such investments as they in their absolute discretion think fit with liberty to vary the same from time to time."

The only codicil to the Will is immaterial to this appeal.

It is to be observed from the Will that the Respondent had only a contingent interest as to one quarter of the estate as from the death up till the 2nd January, 1931, the date of expiration of the twelve years; and further, that the testator made no provision for the Respondent either by way of maintenance or of remuneration as a trustee.

In the course of some litigation in regard to this estate in 1927 (Suit No. 138 of 1927) the Respondent (apparently in April, 1929) furnished under an Order of the Court, a statement of accounts up to the 31st December, 1926. These accounts have not been challenged, but the trial judge accepted the proximity of the date of distribution as a reasonable explanation.

A further statement of accounts as at the 30th April, 1930, was furnished by the Respondent at the request of the then newly appointed trustees. And a third statement was drawn up by Messrs. Y. C. Kong & Company Chartered Accountants as from the 1st May, 1929, to the 30th April, 1931.

The Statement of Claim in the action alleged a number of cases of devastavit and breach of trust by the Respondent as trustee, and alternatively breaches of duty or acts of wilful default. Such of these as are relative to the present appeal, I will deal with presently. The trial judge held

that in certain cases there had been breach of trust, but no wilful default. In regard to the breaches of trust he held that the Respondent ought fairly to be excused under the provisions of section 60 of the Trustees Ordinance 1929, which reproduces substantially section 3 of the Judicial Trustees Act 1896 and provides that where a trustee has acted honestly, and reasonably and ought fairly to be excused he shall not be held personally liable for breaches of trust which he has committed.

The first point I wish to deal with is the position of an appeal Court in relation to a decision of a trial judge who has, as the text books and the reported cases say, exercised his judicial discretion under the Ordinance. It is contended by the Respondent's counsel that this Court cannot interfere with a discretion once exercised. The appellant contended that it was not a matter of discretion at all, and does not come within the ordinary cases dealing with the exercise of discretion. If the former argument is right the competence of this Court is reduced to very narrow limits. If the latter argument is right the matter is at large it is competent for this Court to deal with the matter as a legal decision given by a lower Court.

There appears to be very few cases of appeal from decisions under the Act in England. Only two have been cited to us and I have been unable to find any other. The chief case is *Chapman* v. *Browne* (1902) 1 Ch. 785. The facts and decision here are not material. What is material is that neither in the argument of the respondent nor in the judgments of the Court of Appeal was it ever suggested that the trial judge's exercise of so-called discretion was either outside the competence of the Appeal Court or in any way narrowed its capacity to review the judgment of the lower Court. The same remarks apply to the other case cited, the *National Trustees, etc.* v. *General Finance, etc.*, (1905) A.C. 373.

There is, however, a slight complication in the present case on this point because Whitley, J. heard the Respondent and another witness in the lower Court and based his decision to excuse the Respondent largely upon their verbal evidence and demeanour. The question is how far, if at all, this affects the competence of this Court. In my opinion the ordinary rules as stated in *Khoo Sit Hoh's case* (L.R. 1912 A.C. 323) must apply so far as applicable in regard to the questions for decision, that is whether the trustee was honest, reasonable and ought fairly to be excused. But these rules, I think, only apply to the credibility of the witness as a witness. Where there are documents, inferences from proved facts it is still competent to this Court, in regard to honesty, reasonability and claims to be excused to form its own opinion. The only difference, therefore in my opinion is that whenever the question arises as to whether the Respondent spoke the truth or not we must accept the trial Judge's estimate; but that in other matters this Court is not fettered.

I return now to the charges of breach of trust set out in the Statement of Claim which are material to this appeal. They can be conveniently divided into groups. First, it is said, and is admitted, that the Respondent invested trust monies in personal loans on the security of the jewellery. Secondly, it is said, and is admitted, that he lent money to Chetties at interest, but without security. Thirdly, it is said, and is admitted, that the Respondent occupied certain premises 226 and 226A Burmah Road from 1925 onwards and failed to pay rent for them to the estate. Wilful default is alternatively alleged in regard to the jewellery and Chetty loans.

The learned trial Judge held that in regard to the occupation of the Burmah Road premises there had been a breach of trust and repayment of the amount so due should be repaid with simple 4% interest. He held that in respect of the other charges there was no breach of trust and no wilful default.

The present appeal is lodged against all of these decisions.

It is necessary at the outset to consider the position of a trustee who has "absolute discretion" to "invest" trust funds.

In *In Re Wragg* (1919) 2 Ch. at pages 64 and 65, Laurence, J., said that the verb "to invest" in an investment clause included as one of its meanings "to apply money in the purchase of some property from which interest or profit is expected and which property is purchased in order to be held for the sake of the income which it will yield."

In *In Re Smith* (1896) 1 Ch. at page 76, Kekewich, J., in a case where the trustees had power to invest "as they thought fit" considered whether the trustees acted honestly and with due regard to their fiduciary position as holding the money in trust for other persons. This seemed to indicate that prudence is required.

Loans upon personal security are not open to a trustee who has discretion as to investment [Lewin 13th edition, page 403, and cases cited in note (f)].

An error of judgment by a trustee, if he acted honestly, does not involve liability if there is an express discretionary power.

In *In Re Norrington* (1879) 13 C.D. at page 659, Bacon, V.C., said of "discretion"—"what does it mean?" In honest plain language it means "Do as you like." But he goes on: "A discretion which is to be actively exercised must be exercised honestly and intelligently."

I gather from these cases—for the text-books seem to be somewhat inadequate on the point—that a trustee with absolute discretion to invest must act honestly and with reasonable prudence, and with a view to securing a fair income for the benefit of the beneficiaries.

Now what did the Respondent do here? As regards the jewellery he did what his father had often done. He lent money on the security of jewellery. In a way this was a speculation, though a mild one. It gave no income. The only chance of return was a rise in price; and the opposite happened. The Respondent—an honest man, as Whitley, J., found—says he is ready to supply the deficiency in the value of the jewellery out of the share (which, from being contingent at the time of the investment, has now become vested and is apparently now worth about $65,000). It is said and is no doubt true that it is a widespread custom for Chinese to invest money in jewellery. The custom is not formally proved in this case, or in any other that I know of, and it anyhow conflicts with the element of reasonable prudence.

Further, it appears that the loan of $7,000 on jewellery to Chuah Siew Oo was a loan to his sister-in-law and that the similar loan of $5,000 to Oh Heng Chong was a loan to his brother-in-law; that is, they were accommodation loans and breaches of trust (Underhill 8th edition, page 288). Further, these loans are not—as they produced no income—strictly investments. For these reasons I agree with the conclusion of Whitley, J., that these investments must all be regarded as breaches of trust.

With regard to the loans to Chetties—these may be regarded as investments as they produced income, and they may have been honest for Whitley, J., says that the Respondent is an honest man, but whether they were prudent is another question. Chinese custom is again alleged and is again not proved. They are, in fact, loans upon personal security which unless expressly authorised is a breach of trust (Lewin, page 403). There is this further disclosure in the evidence that on the 6th August, 1927, the Respondent lent $7,000 to a Chetty (one Vairavan, who gives evidence about it) from estate monies and at the same time borrowed $2,000 from the Chetty for his own use at interest. He says that he paid the interest on this personal loan to himself. The transaction is not very satisfactory, and must anyhow be classed with all the other Chetty loans as a breach of trust.

There remains the question of the Burmah Road premises. The Respondent paid no rent, but debited himself—or his (contingent) share—with what Whitley, J., finds, rightly, I think, a reasonable rent. It is clear that this is a breach of trust and Whitley, J., so allowed.

I come now to the question whether there was wilful default in any of these transactions. One such act has to be proved before accounts can be directed upon this footing (*Wildes* v. *Dudlon*, (1870) W. N. 231). Mr. Hume in his very able argument for the appellant, pinned his faith to the Burmah Road rents as the worst case. But, I think, he was unfortunate in his selection. Mr. Hume says it was a wilful default because he did not pay his rent. But the better view is, I think, that the amount represented merely an advance to himself from the estate. There is clear authority for the proposition that such an act by a trustee creates not a wilful default but merely the relation of debtor and creditor as between the trustee and the estate. (*Cheang Thye Phin* v. *Lam Kin Sang* (1929) A.C. at page 676, foot).

In my opinion this is not an item upon which wilful default is established.

Mr. Hume claims wilful default in regard to the other breaches of trust, but I am not sure how far he can set this up when he has failed in regard to the one instance which he set out to prove.

In the view I take, however, it is not material. The only possible act which might, I think, have been attacked as wilful default is the loan to Vairavan of $7,000 from the estate and the loan from Vairavan to himself of $2,000. But even there the Respondent paid interest on his loan and that coupled with Whitley, J's. finding as to the honesty of the Respondent disposes one to think that a case of wilful default is not established even there.

In *In Re City Equitable Fire Insurance Co.* (1925) Ch. 407, 434 and 525 followed in *In Re Munton* (1927) 7 Ch. at page 267, it was held that a person is not guilty of wilful default unless he is conscious that in doing the act complained of, or in omitting to do the act that he ought to have done, he is committing a breach of his duty or recklessly careless whether his act or omission is a breach of duty or not.

I find it impossible in view of Whitley, J's. finding as to the honesty of the Respondent and in view of the general circumstances of the case to say that he was conscious in any of his dealings that he was committing such a breach of duty as would constitute wilful default.

It remains to consider whether Whitley, J., was right in excusing the Respondent under section 61 of the Trustees Ordinance 1929 from liability for the jewellery and Chetty loans. Before one agrees with that view one must be satisfied that the Respondent acted honestly and reasonably and that he ought fairly to be excused. That he acted honestly I do not much doubt especially in view of Whitley, J's. finding. But that he acted reasonably I have grave doubt. The law applicable is that he must act prudently and for the benefit of the estate that he must not lend estate money on personal security or by way of accommodation. Chinese custom cannot avail against the legal requirements of prudence: and in my opinion it would be a very bad precedent to excuse trustees from liability on the ground that others do it and that a trustee is justified in doing with trust money what his father did with his own money.

For these reasons I would vary the judgment of Whitley, J., by holding the Respondent in this case liable not only for the monies taken from the estate for his own use and for the Burmah Road rents but also for the loss on monies advanced on jewellery and the loss on monies advanced to Chetties as set out in the Balance Sheet (page 66) as at the 30th April, 1921, with simple interest at 4%.

As to the costs of this appeal the Appellants have succeeded upon the first ground of the appeal and have failed in regard to the second and third grounds.

I think in the circumstances the fairest order is that the appellant's costs of this appeal be taxed as between solicitor and client and paid out of the estate, and that as to the respondent's costs of the appeal no order be made. The order as to costs in the Court below will stand.

PRICHARD, J.—This is an appeal from a judgment of Whitley, J., who held that the 1st defendant in lending estate monies on the security of jewellery without valuation and to Chetties without securities, did not commit breaches of trust or if he did, that he was entitled to relief under section 60 of the Trustees Ordinance (No. 14 of 1929). This section corresponds with section 61 of the Trustees Act 1925 and reads as follows:—

> "60. If it appears to the Court that a trustee, whether appointed by the Court or otherwise, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Ordinance, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve him either wholly or partly from personal liability for the same."

By the terms of the will the trustees are given an absolute discretion as to investments and consequently they were allowed to invest without security. In spite of absolute discretion the first defendant was bound by the general law to use the usual care of a trustee.

The learned trial Judge held that the first defendant had been a perfectly honest trustee and that he had acted reasonably and that he ought fairly to be excused.

In my opinion he was honest, but I do not think that it was reasonable and fairly excusable for him to lend money on the security of jewellery without valuation.

Still less excusable was it to lend moneys to Chetties without security, and on one occasion, 6th August, 1927, when advancing $7,000 to a Chetty from estate moneys to have borrowed a sum of $2,000 for himself. It will be remembered that at this time the first defendant who was the managing trustee had no means whatever, he merely had a contingent interest in his father's estate.

It was argued that the learned trial Judge having exercised his discretion in favour of the trustee this Court should not interfere.

Lewin on Trusts, 13th edition, p. 950 says—

> "No general rules can be laid down as to the mode in which the Court will exercise its judicial discretion under the section and each case must be governed by its own circumstances."

I cannot find, however, any authority for the proposition that this falls within the class of case where a Court of Appeal ought not to take a different view from the trial Judge. It is quite different from a case for the appointment of a receiver or a question of costs where a higher Court rarely interferes with the discretion of the lower Court. The argument of non-intervention

might very well have been argued in *Chapman* v. *Browne* (1902) 1 Ch. 785 (where a trustee had invested on a second mortgage) on appeal from Cozen-Hardy, J., but no such argument was put forward. The same remark applies to *National Trustees Co. Ltd. of Australasia* v. *General Finance Co. of Australasia Ltd.* (1905) A.C. 373.

The plaintiff claimed to have the accounts taken on the basis of wilful default. But in *Cheang Thye Phin* v. *Lam Kin Sang*: (1929) A.C. p. 670, at page 676, it was held that 'wilful default' does not arise where a trustee has taken advances to himself. The position is merely that of debtor and creditor. Consequently the first defendant's occupation of estate properties without having paid rent is not 'wilful default.'

The appellants having succeeded on the first ground of appeal and failed on the second and third, I consider that the appellant should have his costs of this appeal as between Solicitor and Client paid out of the estate, and that there should be no order as to respondents' costs: the order as to costs in the Court below to stand.

TERRELL, J.—The plaintiffs are beneficiaries under the Will of Khoo Eu Yong deceased, the first plaintiff being a widow and the second plaintiff representing the estate of Khoo Tek Chye a son. Under the Will Khoo Heng Poon, since deceased, and the first defendant were appointed executors and trustees. By an Order made in O.S. 152 of 1930, on the 2nd March, 1931, the second and third defendants were appointed joint managing trustees. By the judgment in the action dated 19th May, 1932, the first defendant was by consent removed from his trusteeship.

The Statement of Claim in para. 9 alleged various breaches of trust against all the defendants and claimed *inter alia* a declaration that the acts of the defendants specified in para. 9 of the Statement of Claim were breaches of trust or alternatively breaches of duty or acts of wilful default. The plaintiffs also claimed the usual administration decree.

At the trial before Whitley, J., the plaintiffs obtained a declaration in respect of paras. 9 (1) and 9 (3) of the Statement of Claim with respect to the first defendant's drawings from the estate and with respect to his occupation of Nos. 288 and 288A Burmah Road belonging to the estate and the first defendant was declared to be chargeable with simple interest at 4% in respect of these items. The usual administration accounts and inquiries were also directed.

No breaches of trust were found against the second and third defendants and the accounts directed were ordinary accounts and not on the footing of wilful default.

The learned trial Judge held in effect that the following allegations of breach of trust against the first defendant contained in para. 9 (4) and 9 (6) of the Statement of Claim had not been established. These paras. read as follows:—

> "9 (4). The first defendant has committed breaches of trust or wilful default in lending out trust funds on personal loans on security of jewelleries without valuation."

and

> "9 (6). The first defendant has committed breaches of trust or wilful default in lending out trust funds to Chetties without securities."

In the alternative the learned trial Judge held that even if these investments were breaches of trust the first defendant was entitled to relief under Section 60 of the Trustees Ordinance (Ordinance No. 14 of 1929).

The second plaintiff appealed against these findings so far as they concerned the first defendant.

The appeal therefore fell into three parts:

(1) Whether the matters alleged in paras. 9 (4) and 9 (6) of the Statement of Claim were breaches of trust;

(2) In the event of breaches of trust being found, whether the first defendant was entitled to relief under the Trustees Ordinance; and

(3) In the event of both the above findings being in favour of the plaintiff, whether the accounts against the first defendant be taken on the footing of wilful default.

The first defendant had an interest in one-fourth share of the estate contingent upon his surviving the period of distribution which was twelve years after the testator's death and expired on the 2nd June, 1931. It cannot be disputed that if the first defendant had not survived the period of distribution the breaches of trust found against him by the learned trial Judge would in all probability have resulted in a loss to the estate of some $18,000.

Under clause 11 of the Will the trustees had a wide power of investment. The clause reads:—

> "I empower my Trustees to invest all moneys liable to be invested in such investments as they shall in their absolute discretion think fit with liberty to vary the same from time to time."

The first defendant on the appeal relied on the findings of the learned Judge that in the circumstances the investments complained of were authorised by the investment clause and that in making them the first defendant acted honestly and reasonably.

It was argued by the respondent that he was justified in investing the money on the security of jewellery and on personal loans to Chetties because he was only following the practice of his late father and also would have invested his own money in the same way if he had had any to invest.

Now *prima facie* a trustee lending money on the security of jewellery on a valuation made by himself, or in advancing money to Chetties on personal security only, is guilty of a breach of trust, and it is necessary to consider in the first place whether in making these investments the trustee was justified under the terms of the investment clause.

It is well established that investment clauses purporting to add to the wide range of investments authorised by Statute are construed strictly for the protection of trustees and remaindermen (Lewin, 13th edition, page 403) and Farwell L.J. in *In re Maryon-Wilson's Estate* 1912, 1 Ch. page 55, states at page 67 "if a greater latitude is to be allowed, testators and settlors should express its extent in clear terms."

For a trustee to lend on personal security he must be expressly authorised and he is not so authorised by a direction to place out money at interest at the trustees' discretion (*Bethell* v. *Abraham*, L.R. 17 Eq. page 24), or on such security as the trustee can procure and may think safe (*Wilkes* v. *Steward*, 35 E.R. page 457).

Even if the investments had been authorised, the trustees would not have been justified in lending money for the accommodation of the borrower, *Langston* v. *Ollivant*, 35 E.R. page 467, still less if the loan was made for the purpose of assisting the trustee himself, and there is reason to suspect that the loans to Chua Saw Oo and Oh Chong Heng were made because they were the sister-in-law and brother-in-law of the respondent and not primarily as an investment. Nor can the Court regard without suspicion the fact that the respondent in making an advance of $7,000 of trust moneys to S.N.S.T. Sartappa Chetty on the 6th August, 1927, obtained a personal advance of $2,000 from the same Chetty on the same day. It is impossible to presume that in a case like this the respondent merely considered the interest of the estate, there being an obvious conflict between his personal interest and his duty.

I find therefore that the investments on the security of jewellery and the personal loans to Chetties were unauthorised and constituted breaches of trust. It is satisfactory to note that the respondent, who may have honestly believed that he had a complete discretion, recognised that he was at all events morally liable for any loss if the value of the jewellery proved to be inadequate (see Record, page 40, line 25).

The next question that arises is whether the respondent is entitled to relief under Section 60 of the Trustees Ordinance. What the Court has to consider is first whether the trustee acted honestly, secondly, whether he acted reasonably; and thirdly, ought he fairly to be excused (see *re Abdeen*, 1930 S.S.L.R. at page 216). The learned trial Judge correctly stated the principles upon which the Court acts in these matters and held even if the acts complained of were breaches of trust of trust the first respondent was entitled to relief.

Before the Court of Appeal it was argued that the learned trial Judge having exercised his discretion, such discretion should not be interfered with unless the Court is satisfied that the discretion has been exercised upon some wrong principle. It was argued in fact that the same principles would apply as in the case of the appointment of a receiver and in the case of costs where a Court of Appeal will rarely interfere with the exercise of a discretion in a lower Court. On the other side it was argued by Mr. Hume that although he would have to accept the learned trial Judge's finding that the first respondent acted honestly, the questions whether he acted reasonably and ought fairly to be excused were open to be reconsidered by the Court of Appeal.

There is very little authority on the point and I will refer shortly to the cases that were cited. *In re Roberts*, 76 L.T. page 479, the Judicial Trustees Act which contains a similar provisions, had only just been brought into force and the discretion, possibly for that reason, was not exercised in the Court below. It was however exercised by the Court of Appeal. In *Chapman* v. *Browne*, 1902, 1 Ch. page 785, a trustee was held at the trial before Cozens-Hardy, J., not to be entitled to relief in the case of an investment on second mortgage. The trustee appealed and the Court of Appeal (Collins, M.R., and Romer and Matthews, L.JJ.) upheld the finding of the lower Court. In the judgment of the Court of Appeal the exercise of the discretion by the Court

was treated as *res integra*, and it is to be remarked that although the arguments of counsel are set out at considerable length, it was never argued by the respondents that the discretion of Cozens-Hardy, J., having been exercised in their favour in the Court below such discretion should not be interfered with by the Court of Appeal. The same conclusion can be drawn from the case of the *National Trustee Co. of Australasia Ltd.* v. *General Finance Co. of Australasia Ltd.*, 1905, A.C. page 373. That was a decision under Section 3 of the Victorian Trusts Act 1901, which is similar in effect to Section 60 of the Trustees Ordinance. The question was considered on its merits in the Privy Council and there was no argument by counsel or suggestion in the judgment that the Court was bound in any way by the manner in which the discretion had been exercised in the Courts below if it arrived at a different conclusion on the facts.

I find therefore that the Court should accept the finding of the learned trial Judge that the respondent acted honestly. This finding is based upon the impression which the learned trial Judge formed of the respondent's evidence which he heard *viva voce* and according to well known principles should not be disturbed. I find however that the Court of Appeal must form its own opinion on the facts as proved as to whether the respondent acted reasonably and ought fairly to be excused.

The cases in which relief has been granted and withheld are summarised on pages 714 and 715 of Godefroi (5th edition), but of course these cases merely provide an indication of the principles upon which the discretion should be exercised and do not provide an exact authority in other cases where the circumstances are widely different. It is clear however that honesty is by no means the only criterion and a trustee has been held liable when he quite honestly confided in his co-trustee who made an improper investment (*re Turner*, 1897, 1 Ch. page 536). As regards the investments in question which I have found constituted breaches of trust, I cannot see why the respondent should be excused if money has been lost through his own valuation of the jewellery proving incorrect, especially when it is probable that some of the advances were made partly for the accommodation of his relatives. Nor can there be any excuse for advancing estate money to a Chetty and on the same day taking an advance to himself. Further than this I am inclined to think that the trustee's conduct must be considered as a whole before the Court can come to the conclusion that he acted reasonably and ought fairly to be excused, and there can be no excuse for his drawings in anticipation of a share in the estate which was only contingent, nor for his occupation of estate property rent free. I am of opinion therefore that on this point also the appeal must succeed and that the respondent must be held liable in respect of any losses in respect of the advances on jewellery or on the personal security of Chetties.

The only point that remains for decision is whether the account should be taken on the footing of wilful default. It is well established that in cases of breach of trust relief will be given only for the particular breaches of trust proved and that proof of a breach of trust will not of itself entitle a plaintiff to an account on the footing of wilful default (*re Wrightson* 1908, 1 Ch. pages 789 and 791). It has been laid down by the Privy Council in *Cheang Thye Phin* v. *Lam Kin Sang*, 1929 A.C. page 670 at page 676 that when a trustee has taken advances to himself no question of wilful default arises. It is simply a case of debtor and creditor. This principle therefore applies to the respondent's drawings on account of his contingent share. I think it also applies to his occupation of estate properties free of rent. The effect of that was that the respondent put into his pocket rents which belonged to the estate and he is under the Order of the Court below to be charged with such rents and interest at 4%. This was the only act of wilful default alleged by the plaintiff. Furthermore, the respondent had already admitted this particular breach of trust in the accounts filed in Suit No. 138 of 1927 upon which the present action was based, and even if it should be construed as an act of wilful default, there is authority for saying that an account will not be ordered on the footing of wilful default in respect of a single act of wilful default which has been admitted (Seton 6th Edition, page 1162).

On this point therefore the appeal fails. As the appellant has succeeded on the greater part of his appeal I would direct that the appellant should have his costs as between solicitor and client out of the estate of the deceased, and that there should be no order as to the respondent's costs, the order as to costs in the Court below to stand.

Appeal allowed in part.

Solicitor for the Appellant—*Ong Huck Lim.*

Solicitors for the Respondent—

Logan Ross & Samuel.